February 2, 2005

Country of Origin Labeling Program
Room 2092-S; Agricultural Marketing Service
U.S. Department of Agriculture; Stop 0249
1400 Independence Avenue SW
Washington, DC 20250-0249

RE: Docket No. LS-03-04

The United Fresh Fruit and Vegetable Association (United) is pleased to submit comments regarding USDA's Interim Final Rule implementing mandatory country of origin labeling for fish and shellfish.

Founded in 1904, United's mission is to promote the growth and success of produce companies and their partners. United is a vertically integrated national trade organization that represents the interests of growers, shippers, fresh-cut processors, brokers, wholesalers and distributors of produce, working together with their customers at retail and foodservice, suppliers throughout the distribution chain, and international partners.

While the interim rule deals specifically with seafood rather than produce, we respectfully urge the Department's careful consideration of our comments. We have reviewed the rule with regard to its implementation of the Farm Security and Rural Investment Act of 2002, as well as possible implications for future produce labeling regulations. We believe our comments here will illuminate several key issues, but emphasize that these comments on this specific rule must not be construed to imply any future position on a potential produce rule that may be promulgated by the Department.

We are pleased to provide the following comments on specific aspects of the rule:

1. Definition of Food Service Establishment (§60.107)
In general, we support the definition of food service establishment to establish that many facilities and product offerings within a retail establishment otherwise covered under the Act would be exempt from labeling requirements. With regard to produce, these would of course include salad bars, but should also include fresh fruits and vegetables offered in any ready-to-eat display designed for take-out, regardless of location within the store.

2. Definition of Processed Food Item (§60.119)
We support the rule's definition of a processed food item as one in which the item has undergone a "change in the character of the covered commodity, or has been combined with at least one other covered commodity." In addition, we support the further example of a processed food item to include items that have undergone "restructuring, e.g., cut into portions." With regard to

produce, this definition will exempt fresh-cut produce derived from a single covered commodity, as well as any produce item that had been combined with another produce item such as a bagged salad or fruit cup. Each of these examples constitutes a processed food item under the origin labeling rule. However, we strongly suggest that should the Department propose a produce labeling rule, it specifically state in discussion about this issue that the processed food item definition contained therein for the purposes of country of origin labeling in no way affects or diminishes other pre-eminent labeling requirements for use of the word "fresh," "fresh-cut," or similar terms under FDA and FTC labeling rules.

3. Definition of Retailer (§60.124)

We are sympathetic to the Department's analysis (FR59723) of which "retailers" must be covered under the Act due to its specific reference to the Perishable Agricultural Commodities Act (PACA). We believe this to be a fundamental flaw in the Act, and one that USDA should address more directly in advising the Congress as to the unintended effect of this provision. With regard to seafood, it is unreasonable and negates the intent of the law to exempt fish markets from labeling rules while retail stores that purchase at least $230,000 in fresh produce annually are the only retailers covered. This peculiar juxtaposition does not serve consumers well, and needs to be changed through an amendment to the Act.

We suggest the Department consider recommending a technical correction to this provision of the Act, and decoupling the definition of "retailer" for COO purposes from PACA altogether. Rather, we suggest the definition of retailers that should be covered under COO be determined by some overall financial threshold that reduces the burden on small business to the maximum extent possible. This correction would be more fair to all types of retailers, and would also eliminate a major concern that compliance with COO labeling rules may provide a disincentive to smaller retailers to purchase $230,000 of fresh produce. Many small mom and pop stores may choose to purchase less than that threshold of fresh produce in order to eliminate their need to comply with COO rules.

Finally, should no changes be forthcoming in the Act, we suggest a change in §60.124 to read "Retailer means any person [***required to be***] licensed as a retailer under the Perishable Agricultural Commodities Act of 1930. Based on our concern about the costs of compliance with COO labeling rules, it is important to minimize the likelihood of a retailer choosing to ignore PACA licensing as a way to eliminate labeling compliance. This change specifies that all retailers that should be licensed are covered, not just those that have officially been licensed or come to the attention of the PACA branch of AMS.

4. Country of Origin Notification (§60.200); Subsection (f) Labeling Imported Products That Have Not Undergone Substantial Transformation in the United States

We support the specific recognition that imported products in consumer-ready packages that comply with existing rules under the Tariff Act of 1930 require no further labeling.

5. Country of Origin Notification (§60.200); Subsection (h) Blended Products

We support the specific recognition in the rule that imported covered commodities commingled with other imported covered commodities and/or covered commodities of U.S. origin shall be labeled for country of origin in accordance with other existing laws. The Department's analysis (FR59709) is helpful in clarifying that "the declaration of the retail product can indicate the several countries of origin that are represented in the overall blending process, without being required to verify which specific countries of origin are found within each individual retail package." In the case of produce, we infer this to allow for a bag of whole fruit (e.g. apples and oranges) from two or more countries to simply list those countries on the package without regard to predominance of weight, which fruit is from which country, or other requirements beyond current law. In addition, fruits or vegetables that are commingled with produce from two or more countries and then repacked for retail sale can be labeled listing those two or more countries without the need to verify products of which specific countries are included in any given retail package.

6. Country of Origin Notification (§60.200); Subsection (i) Remotely Purchased Products

We support this provision to allow for notification of COO at the time the produce is delivered to the consumer.

7. Markings (§60.300); Subsection (d) Bulk Containers

We support this provision to recognize that bulk displays may contain covered commodities from two or more countries, "provided all possible origins" are listed. This is a critically important provision to allow for flexibility at retail level. In the case of produce, we infer this to allow for a display bin of bananas to be labeled "Product of Costa Rica, Ecuador or Honduras," and be fully compliant with the rule, so long as products from other countries are not contained therein.

8. Markings (§60.300); Subsection (f) State Designations

We disagree with the Department's interpretation (FR59716) of the Act, and believe USDA has the authority to allow U.S. state designations to convey the U.S. origin of the product.

9. Recordkeeping Requirements (§60.400); Subsection (a) General

We support the specific recognition that acceptable records can come in a variety of forms.

10. Recordkeeping Requirements (§60.400); Subsection (b) Responsibilities of Suppliers (1)

In general, we support the notion that the initial supplier of a product must make available COO information if that product is being offered to a retailer under the Act for sale to consumers. However, this provision and accompanying discussion must clarify that suppliers have no mandatory requirement to offer COO information on all of their products offered for sale. Many covered commodities will be destined for sale to foodservice establishments and otherwise

outside of the expected distribution channel to "covered retailers." The marketplace will determine what product eventually makes it way to a covered retailer, and then the specific distribution chain for that product must be traceable to the initial COO declaration of a supplier. If a retailer or intermediary supplier is offered for sale a covered commodity that does not have a COO declaration, he may choose not to buy that product or to purchase and sell it though a channel not required to comply with COO labeling.

11. Recordkeeping Requirements (§60.400); Subsection (b) Responsibilities of Suppliers (2)

We strongly disagree with the Department's analysis (FR59717) and incorporation of language which guts the legal liability protection intended by this provision. We strongly support liability protection in which an intermediary supplier (or subsequently a retailer) "shall not be held liable for a violation of the Act by reason of conduct of another." The rule must stop here. However, the current rule negates this provision with the qualification "if the intermediary supplier could not have been reasonably expected to have had knowledge of the violation." We have commented about this provision previously, and find it troubling to see such a flawed provision still alive. This would open a terribly wide legal "gray area" in which battles could rage over what one could "reasonably be expected to have known."

The Department's own analysis (FR59717) supposes that every retailer should know that "fresh wild salmon from Alaska in January" could not possibly be accurate. Why? This recalls the verbal comment from the former AMS Administrator who stated in a technical briefing on the proposed final rule in 2003, "Retailers will not be held liable for the accuracy of the information provided by suppliers. However, they will be responsible if they use erroneous information that could have been reasonably determined. A good example would be table grapes in January and February. You know these aren't from the United States. They've got be Chilean because they're out of season." (Transcript of USDA Technical Briefing 10/27/03). That analysis essentially negates an intermediary supplier or retailer's ability to reply upon what the supplier tells him, thus destroying any notion of a safe harbor.

For produce, we recommend following PACA rules that specifically protect subsequent handlers from violations due to faulty information provided by suppliers.

12. Recordkeeping Requirements (§60.400); Subsection (b) Responsibilities of Suppliers (3,4)

These provisions seem to provide no further requirement than current law, and thus are not essential to this rule. We recommend that the rule merely cite the Department's intent to use existing records required under other current law to verify COO declarations at the retail level back to the original supplier. The Department's analysis at FR59716 supports this recommendation.

13. Recordkeeping Requirements (§60.400); Subsection (c) Responsibilities of Retailers (1)

We support the provision to require retail records at store level only "for as long as the product is on hand." This is a major step toward better efficiency and common sense in the interim rule.

We also strongly support the specific recognition that retailers may rely upon pre-labeled products as "sufficient evidence" of the COO. This is an important safe harbor for the produce and retail industries, as an increasing share of fresh produce now arrives at retail stores pre-labeled with COO. However, we still are concerned about the major negative implications of the issues raised in Item 11 above, and question whether this "pre-labeled product" safe harbor is sufficient to override the Department's own examples of information intermediaries or retailers "should have known." That fundamental flaw must still be eliminate from the final rule.

14. Recordkeeping Requirements (§60.400); Subsection (c) Responsibilities of Retailers (2)

Similar to Item 12 above, this provision seems extraneous as to verification of COO. Retailers must maintain records of suppliers as already required by other laws, and such records provide the means to trace back to the original supplier who made a COO declaration. As it is the Department's intent to provide a safe harbor (albeit not yet perfected) for both intermediaries and retailers to reply upon the truthfulness of the original declaration, this provision is not required in order to fully trace back to the first supplier who declares COO. The analysis of labeling salmon steaks at FR59726 is illustrative of this point, but not fully clear in the rule.

In the case of produce, even further requirements under PACA specific that records must be available, and also provide for liability for making false or misleading claims. AMS would interpret that a PACA licensee who provides a false COO declaration is guilty of misbranding under the PACA

15. Recordkeeping Requirements (§60.400); Subsection (c) Responsibilities of Retailers (3)

We support the notion of a transition period in implementation of the rule.

Other Issues:

16. States' Role in Enforcement

We support the Department's commitment (FR59709) that USDA will determine the scheduling and procedures for compliance reviews, and that only USDA will be able to initiate enforcement actions. We also urge clarification that states will not earn any "profit" from their cooperative enforcement activities, but rather simple reimbursement of costs.

17. Existing State Programs

We support the Department's interpretation that state programs that encompass commodities subject to this regulation are preempted. This is an important step as several states are now considering implementing their own COOL programs.

18. Cost of Administration

The Department estimates that $2.8 million would be required to administer the seafood rule (FR59720). We believe this number could likely be much higher with regard to produce. As such, it is essential that all costs to administer a program must be supported by USDA's appropriated budget, and in no way draw on user fees or take away staff time and commitment to other AMS programs for which user fees are required.

19. Interim Final Rule for Produce

We recommend that if the Department is compelled to publish a rule implementing mandatory country of origin labeling for produce, it follow the same format as used with seafood and publish a unique interim final rule limited to perishable agricultural commodities and seek public comment on the rule. If no amendments are made to the Act, we recommend USDA publish an interim final rule for produce no later than September 30, 2005, in order to allow the industry one year prior to the effective date to review and comment on the rule, and begin making business plans.

We hope that these comments are useful both is making changes and improving the seafood rule, as well as in drafting a potential produce rule in the future. Should you have any questions or matters that need clarification, we would be happy to expand on these comments either in writing or in person.

Sincerely,

Thomas E. Stenzel
President and CEO